POLICE DEPARTMENT

November 19, 2020

In the Matter of the Charges and Specifications	:	
- against -	:	
Police Officer Lenny Lutchman Tax Registry No. 955104 81 Precinct	:	Case No. 2018-19106
Sergeant Pearce Martinez Tax Registry No. 955137 Housing PSA 9	:	Case No. 2018-19107

At:	Police Headquarters One Police Plaza New York, NY 10038
Before:	Honorable Josh Kleiman Assistant Deputy Commissioner Trials

APPEARANCES:

For the CCRB-APU:	Suzanne O'Hare Esq. Civilian Complaint Review Board 100 Church Street, 10th Floor New York, NY 10007
For Respondent Lutchman:	Craig Hayes, Esq. Worth, Longworth & London, LLP. 111 John Street, Suite 640 New York, NY 10038
For Respondent Martinez	Matthew Schieffer, Esq. The Quinn Law Firm 399 Knollwood Road, Suite 220 White Plains, NY 10603

To:
HONORABLE DERMOT F. SHEA
POLICE COMMISSIONER
ONE POLICE PLAZA
NEW YORK, NY 10038

CHARGES AND SPECIFICATIONS

Disciplinary Case No. 2018-19106

1. Police Officer Lenny Lutchman, on or about July 7, 2015, at approximately 1608 hours, while assigned to Patrol Borough Brooklyn North and on duty, outside of 421 Bainbridge Street, Kings County, with intent to cause physical injury to Thomas Jennings, did attempt to cause physical injury to Thomas Jennings, in that Police Officer Lutchman struck Thomas Jennings with an asp.

P.G. 203-11 *(now encompassed by P.G. 221-02)*
Penal Law § 110/120.00(1)

USE OF FORCE
ATTEMPTED ASSAULT
IN THE THIRD DEGREE

2. Police Officer Lenny Lutchman, on or about July 7, 2015, at approximately 1608 hours, while assigned to Patrol Borough Brooklyn North and on duty, outside of 421 Bainbridge Street, Kings County, with intent to cause physical injury to Thomas Jennings, did attempt to cause physical injury to Thomas Jennings, in that Police Officer Lutchman struck Thomas Jennings in the head with his elbow.

P.G. 203-11 *(now encompassed by P.G. 221-02)*
Penal Law § 110/120.00(1)

USE OF FORCE
ATTEMPTED ASSAULT
IN THE THIRD DEGREE

Disciplinary Case No. 2018-19107

1. Sergeant Pearce Martinez (while serving in the rank of Police Officer), on or about July 7, 2015, at approximately 1608 hours, while assigned to Patrol Borough Brooklyn North and on duty, outside of 421 Bainbridge Street, Kings County, with intent to cause physical injury to Thomas Jennings, did attempt to cause physical injury to Thomas Jennings, in that Sergeant Martinez struck Thomas Jennings in the head with a closed fist.

P.G. 203-11 *(now encompassed by P.G. 221-02)*
Penal Law § 110/120.00(1)

USE OF FORCE
ATTEMPTED ASSAULT
IN THE THIRD DEGREE

REPORT AND RECOMMENDATION

The above-named members of the Department appeared before me on September 24, 2020. Respondents, through their respective counsel, both entered pleas of Not Guilty to the

subject charges. The Civilian Complaint Review Board ("CCRB") called Thomas Jennings as a witness, and introduced a video recording that captured a portion of the incident. Respondents testified on their own behalves. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review. Having reviewed all of the evidence in this matter, I find Respondent Martinez Guilty of the sole specification in Disciplinary Case No. 2018-19107 and recommend the forfeiture of 10 vacation days, and I find Respondent Lutchman Not Guilty of Specification 1 and Guilty of Specification 2 in Disciplinary Case No. 2018-19106 and recommend the forfeiture of 12 vacation days.

ANALYSIS

These two disciplinary cases arise out of Respondents' uses of force during the arrest of Mr. Thomas Jennings on July 7, 2015.

The Uncontested Facts

On July 7, 2015, an owner of a restaurant establishment in Brooklyn, the owner, contacted 911 to report that two individuals threatened him and stole food products[1] from his establishment. The owner reported that one of the two individuals had a knife. Respondents, who were uniformed and in a marked patrol car, responded to a call of a robbery involving a knife and picked up the owner to conduct a canvass for the suspects. (Trial Transcript at ("Tr.") 150-52, 212-13; Resp. Ex. A at 2-3.)

During the course of the canvass, the owner positively identified two men, one of whom Respondents later identified as Thomas Jennings, and the other who ran away from

[1] There appeared to be confusion at trial and on the day of occurrence as to what food items were stolen. At trial, the items were variously described to be "two pies," "a slice of pizza," "oregano and red pepper shaker," "some slices and some shakers," and "the garlic, the crushed pepper and the oregano" (Tr. 26, 250, 259, 287-88).

Respondents before they could identify him. No evidence was presented that The owner told Respondents which of the two individuals had a knife. At trial, Mr. Jennings explained that the second male was his younger relative. While Mr. Jennings denied resisting arrest and causing a subsequent foot chase, the parties agreed that Respondents engaged Mr. Jennings inside a nearby convenience store. (Tr. 57, 59, 78, 82-83, 153-55, 163, 214-15, 218.)

A CCTV camera inside the convenience store captured the interactions between Mr. Jennings and Respondents (CCRB Ex. 1). Respondents admit that they used force on Mr. Jennings inside the convenience store, in the following order: (1) Respondent Martinez threw three punches at Mr. Jennings, which landed on the rear of Mr. Jennings' head, (2) Respondent Lutchman struck Mr. Jennings on the back nine times with the handle of his expandable baton ("asp"), and (3) Respondent Lutchman struck Mr. Jennings in the back of his head with his elbow and forearm, causing Mr. Jennings' head to slam against the glass top of an ice cream display case. Following these uses of force, Mr. Jennings was handcuffed inside the convenience store. (Tr. 64, 173, 199-200, 201, 219-20.)

No knife was recovered from Mr. Jennings. Respondent Lutchman escorted Mr. Jennings to a hospital where he was treated for a 2cm laceration to his right eyebrow, requiring five stitches. (Tr. 163, 174, 244, 247; CCRB Ex. 2 at 6-7.)

Mr. Jennings' Version of Events

At trial, Mr. Jennings testified that he attempted to purchase two slices of pizza at [redacted] establishment, but was short on money. He used his cellphone to call his relative who brought him money to pay the balance. According to Mr. Jennings, the only dispute inside the restaurant occurred because a worker had given Mr. Jennings and his relative hot water when they wanted cold water because it was a hot day. The dispute ended without incident. Mr.

Jennings and his relative then took their pizza to go and left. As Mr. Jennings walked from the restaurant, he and his relative became separated by about 50 feet. From that distance, he saw two policemen "pull up" in a patrol car and stop his relative. Mr. Jennings stated that he immediately went into a "deli" to buy a drink and a cigarette, and to use a phone to call his mother to inform her of his relative situation. (Tr. 56-59, 95-99.)

Mr. Jennings stated that a short time after he entered the convenience store, Respondent Lutchman entered swinging a baton and cursing at him. Mr. Jennings could not remember anything Respondent Lutchman said specifically. A few seconds later, Respondent Martinez entered and both Respondents began hitting him. Mr. Jennings stated that he felt pain each time he was hit, received a cut above his right eyebrow when he was "banged up against" an ice cream freezer, and had a "scrape" that left a "scab" on his back from the asp being "dug into" his back. (Tr. 62-64, 69, 90-91.)

On cross examination, Mr. Jennings was asked how he planned to purchase anything at the convenience store after testifying that he did not have enough money to pay for the pizza slices and why he needed to use a phone to call his mother after testifying that he had used his cellphone to call his relative. Mr. Jennings responded that he "probably" had some "change" that "fell out of [his] pockets" for the cigarette and stated that he might not have had a cellphone that day and may have used someone else's phone to call his relative. Mr. Jennings also admitted that when interviewed by members of the Internal Affairs Bureau on July 22, 2015, he had not mentioned that he was with his relative that day and had instead referred to his relative as a "black guy." Mr. Jennings further admitted, based on his prior interview statements, that Respondent Lutchman had said "something about a robbery" inside the convenience store. (Tr. 84, 88, 104-106, 143-44; Resp. Ex. 2 at 22, 24.)

Respondents' Version of Events

Both Respondent Lutchman and Respondent Martinez testified that on July 7, 2015, upon responding to a radio call of a robbery involving a knife, they were met by the owner who confirmed that he had been robbed at "knifepoint." Respondent Martinez further recalled [redacted] saying that "two males came to the store, pulled out a switch blade and took everything off the counter." They then conducted a canvas for the suspects, placing the owner in the rear of the patrol car. (Tr. 150-52, 164, 213.)

After a "minute or two" of conducting the canvass, the owner pointed at two males and identified them as the perpetrators of the robbery. Respondents exited the patrol car and approached the two men. While one of the men, later identified as Mr. Jennings, remained to speak with them, the second male ran. Respondent Martinez stated that while he had planned to chase the second male, he decided instead to stay with his partner because he observed Mr. Jennings to be acting "erratically." Respondent Lutchman stated that he told Mr. Jennings to "calm down," but Mr. Jennings was "fidgeting" with his hands. Respondents both stated that they were wary of Mr. Jennings because they thought he might have a knife. Respondent Lutchman testified that he informed Mr. Jennings that he had been identified as a suspect in a robbery and that he would be arrested. (Tr. 153-57, 214-16.)

Respondent Martinez testified that he commenced a frisk of Mr. Jennings and felt a "hard object" in his left pocket. Each time he reached for the object, however, Mr. Jennings moved away. Respondent Martinez then decided to place Mr. Jennings in handcuffs. Respondent Martinez testified that as he grabbed one of Mr. Jennings' hands and reached for his handcuffs, Mr. Jennings "whipped" his hand away and ran.

Respondents testified that Respondent Lutchman gave chase while Respondent Martinez returned to his assigned patrol vehicle and attempted to follow. The owner remained in the backseat of the patrol car. After a substantial chase, which left Respondent Lutchman feeling "exhausted," Mr. Jennings darted into a convenience store. Respondent Lutchman testified that he then "screamed" over the radio, "Martinez, he's in the deli." Respondent Martinez stated that when he heard this, given Respondent Lutchman's tone, which Respondent Martinez described as "frantic" and "scared," he believed Respondent Lutchman was in trouble. (Tr. 158-63, 215-18.)

Respondent Lutchman testified that when he arrived at the convenience store, he observed Mr. Jennings pacing by the counter. Despite not seeing Mr. Jennings in possession of a knife, Respondent Lutchman removed and extended his expandable baton because he wanted to be prepared in case Mr. Jennings did have a knife. Respondent Lutchman told Mr. Jennings to put his hands behind his back, but Mr. Jennings did not comply. Rather, Mr. Jennings had his hands up with his palms facing forward. Respondent Lutchman stated that he tried to grab Mr. Jennings' left hand to effect an arrest, but Mr. Jennings pulled it away. He continued giving Mr. Jennings verbal commands, but he again did not comply. Respondent Martinez then arrived on scene. (Tr. 162-167, 179, 209.)

Respondent Martinez testified that when he first arrived at the deli, since the entrance was at an angle to the counter, all he could see was Respondent Lutchman with his baton out, which he stated "raised every hair, every alert in my body that something serious was going on" because "we never pull out our baton. . . unless it's something serious, like, a knife or a gun" (Tr. 219). Respondent Martinez noted that he was also on alert because of the "tone of fear" he heard in his partner's voice when Respondent Lutchman had radioed, "Martinez, he's in the deli" (Tr.

217). Respondent Martinez testified that he did not see Mr. Jennings' hands up and "figur[ing]" that Mr. Jennings had displayed a knife because his partner had his asp out, he "ran" into the convenience store (Tr. 218, 225).

Respondent Martinez testified that he reached Mr. Jennings in "less than a second" and immediately hit him three times with a closed fist to gain his compliance (Tr. 219, 222, 248). Respondent Martinez then grabbed Mr. Jennings' hand and attempted to place handcuffs on him. Respondent Martinez stated that he only intended to strike Mr. Jennings in the upper body, not the head, and was not trying to hurt Mr. Jennings. He acknowledged that once inside the convenience store he did not give Mr. Jennings any instructions or speak to his partner prior to employing force. Furthermore, Respondent Martinez admitted that he knew backup was on the way. (Tr. 219, 222-24, 228.)

Respondent Lutchman testified that after Respondent Martinez "engaged" with Mr. Jennings, he then struck Mr. Jennings with the handle of his baton, avoiding contact with "certain areas" pursuant to the Patrol Guide and his training at the Police Academy (Tr. 167-69, 175-76). Respondent Lutchman stated that he used the handle of the baton in an effort to gain compliance from Mr. Jennings and help his partner to get control of Mr. Jennings' hands to effect the arrest. Respondent Lutchman testified that he was unable to swing the asp because his partner was standing too close to Mr. Jennings for the asp to be swung in a safe manner. (Tr. 169-70, 172.)

Respondent Lutchman testified that because Mr. Jennings "kept moving," he raised his elbow and forearm and brought it down on Mr. Jennings in an attempt to gain control of Mr. Jennings' upper body. He stated that he was not aiming for Mr. Jennings' head and neck, but

acknowledged that this is where the blow landed, driving Mr. Jennings' head into the ice cream freezer. (Tr. 199-200.)

On cross examination, Respondent Martinez stated that he was the arresting officer and conceded that in the arrest paperwork he had recorded "no force used." He also admitted telling the District Attorney's Office that Mr. Jennings had "flailed his arms" inside the convenience store, but claimed that he based this description on Respondent Lutchman's portrayal of events. He also acknowledged that he never recorded that he had frisked Mr. Jennings or that he had felt a bulge in his arrest paperwork or activity log. He further admitted that he did not tell his partner about discovering a "hard object" that could possibly be a knife. Respondent Lutchman testified that he did not observe a bulge and did not testify that he saw a frisk. (Tr. 224-30, 238-39, 243-44.)

Interview The owner

did not testify at trial. The parties stipulated to the admission of a transcript of a field interview of the owner conducted by IAB (Resp. Ex. A) on July 22, 2015. The audio of the interview, from which the transcript was generated, was not introduced by either party at trial. the owner's first name was unknown by the parties at the time of trial and was not established in the interview (Tr. 20).

During the interview, the owner explained that on July 7, 2015, two men, one of which he later identified as Mr. Jennings, paid $2 for two slices of pizza that sold for $1.50 each, causing an argument to ensue. The owner then took one of the slices back, causing the unidentified male to pay the remaining sum for the slice. Mr. Jennings then threatened

saying that if he was on the other side of the counter he would "beat" the owner and "spit in [his] face." The unidentified male then pointed out to Mr. Jennings that there was a

camera at the location.[2] The unidentified male then briefly stepped outside, came back in, and then told the owner to look at him, quickly flashing a switchblade. Mr. Jennings and the unidentified male then called the owner "names" and took the garlic, crushed pepper and oregano shakers off the counter and left. the owner then called the police. (Resp. Ex. A at 2-3.)

The owner stated that upon Respondents approaching the suspects, the unidentified male ran away and Mr. Jennings remained on scene for "like 30 seconds" before he ran away as well. When asked where Mr. Jennings ran, the owner stated, "He was going crazy – he was running all over, about two-three blocks up and down and finally he went to the deli." [redacted] stated that he did not see anything happen in the convenience store. (Resp. Ex. A at 5-6, 10.)

Video Evidence

The one-minute ten-second (1:10) video clip from the convenience store camera (CCRB Ex. 1) depicts Mr. Jennings inside the convenience store at approximately 3:28pm on July 6, 2015.[3] The camera is installed behind the cashier's counter and is pointed towards the cashier's counter and into the store. The following events are depicted in chronological order:

> Mr. Jennings enters and proceeds to the cashier's counter, appearing to speak to someone behind the counter.[4] Five seconds later, Respondent Lutchman enters the convenience store, approaches Mr. Jennings' left side, and with his left hand extended pushes Mr. Jennings' right shoulder. Respondent Lutchman is carrying a black, expandable baton, fully extended, in his right hand, which he keeps lowered and at his side. As Mr. Jennings

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[2] The owner stated that the 81st Precinct took possession of the surveillance video from his restaurant (Resp. Ex. A at 9-10). The surveillance video from the owner's establishment was not introduced at trial and no party or witness claimed to have seen it.
[3] No assertion was made that the timestamp on the video was inaccurate or accurate. The charges approximate the time to be 4:08pm. It was not established at trial how CCRB established the timestamp they used in the charges.
[4] Neither the cashier, nor any other civilian witnesses from inside the convenience store, testified or were referred to at trial.

turns around, Respondent Lutchman keeps his left arm extended in the direction of Mr. Jennings, preventing Mr. Jennings from coming closer to him.

Respondent Lutchman continues speaking to Mr. Jennings, who raises both his hands up in front of him with his palms facing Respondent Lutchman. Mr. Jennings maintains his hands in this position for approximately seven seconds.

At this point, Respondent Martinez swiftly enters the convenience store and throws a punch with his right hand, landing across the back of Mr. Jennings' head. At the same time, Respondent Martinez, using his right arm, grabs Mr. Jennings' left arm and pulls it towards the floor. Simultaneously, Respondent Martinez follows with two more punches directed at the back of Mr. Jennings' head. Mr. Jennings turns away from the counter, bending at the waist towards an ice cream display freezer with a flat glass top,[5] located underneath the cashier's counter.

As Mr. Jennings bends over, Respondent Lutchman raises his right hand, holding the asp, and brings his fist down on Mr. Jennings left shoulder blade. Respondent Lutchman then places his left arm and chest on Mr. Jennings' upper body, keeping Mr. Jennings bent over on top of the freezer. Respondent Martinez then gains control of Mr. Jennings' left arm. As he is moving the arm towards Mr. Jennings' back, Respondent Lutchman raises his hand holding the asp a few inches up over Mr. Jennings' back and brings the handle of his asp down on Mr. Jennings' lower left back three times in quick succession. Respondent Martinez then brings Mr. Jennings' left hand to the center of Mr. Jennings' back, retrieves his handcuffs, and places a handcuff around Mr. Jennings' left wrist. Respondent Lutchman then moves his asp to the upper right side of Mr. Jennings' back. He raises his asp several inches away from Mr. Jennings' back and brings the handle of the asp down on Mr. Jennings' back twice as Respondent Martinez attempts to shift Mr. Jennings' body over to gain control of Mr. Jennings' right arm. As Mr. Jennings' body is moved and Respondent Martinez gains control of Mr. Jennings' right arm, Respondent Lutchman moves his asp to Mr. Jennings' lower right back and again raises his asp up several inches and brings the handle of the asp down on Mr. Jennings' back.

At this point, a backup officer arrives and begins assisting Respondent Martinez with handcuffing Mr. Jennings' right arm. A second backup officer arrives moments later but does not put his hands on Mr. Jennings. Respondent Lutchman again raises his asp several inches and brings the handle of the asp down on Mr. Jennings' lower right back three times.

Respondent Lutchman next turns his attention to Mr. Jennings' head. Respondent raises his left arm and forcibly brings his elbow and forearm down on the back of Mr. Jennings' head, causing Mr. Jennings' head to slam against the freezer. Respondent Martinez then successfully handcuffs Mr. Jennings' right arm as yet two more officers arrive on scene (bringing the total number of officers inside the convenience store to six).

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[5] This fixture was identified by each witness during their testimony (Tr. 64-65, 189, 200, 229).

Respondent Lutchman then stands up, taking his weight off Mr. Jennings, whose face is seen on camera for the first time since Respondent Martinez threw his first punch. A small bloody wound above Mr. Jennings' right eye becomes visible as Mr. Jennings stands up. Respondent Martinez escorts Mr. Jennings out of the convenience store and the video clip ends.

The police encounter depicted in the video came to the attention of both the Internal Affairs Bureau and CCRB as the result of an article published in the New York Daily News on July 22, 2015.[6] The video evidence detailed above was obtained by CCRB from a website operated by the New York Daily News (Tr. 315).

Medical Records[7]

On stipulation, CCRB entered Mr. Jennings' medical records (CCRB Ex. 2) from later the same day, which indicate treatment for a laceration to Mr. Jennings' right eyebrow, requiring five stiches. The medical records specifically note that Mr. Jennings made "no further complaints" (Ex. 2 at 2). While Mr. Jennings stated that he received pain medication at the hospital, the medical records do not establish what, if any, medication was given to Mr. Jennings (Tr. 64; CCRB Ex. 2).

Police Academy Recruit Manual

On stipulation, CCRB entered the July 2013 edition of the recruit manual from the NYPD Academy (Ex. 3). It instructs that when using an expandable baton MOS should "avoid strikes to

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[6] Specifically, CCRB explained in a post-trial submission, accepted by Respondents' attorneys, "A complaint was filed with CCRB on July 22, 2015, by [Person A], a reporting non-witness. [Person A] viewed the video of the incident in conjunction with a Daily News article. After the complaint was filed, an investigation commenced." The tribunal took judicial notice of the fact that the first article published by the New York Daily News on the subject of Mr. Jennings' arrest was published on July 21, 2015, at 8:17pm. John Marzulli, *EXCLUSIVE: Video shows cops beating alleged pizza thief as he raises arms to surrender inside Brooklyn grocery store,* NY Daily News (July 21, 2015), *available at* http://www.nydailynews.com/new-york/nyc-crime/video-shows-cops-beating-suspect-surrender-article-1.2299659. The owner and Mr. Jennings were interviewed by IAB on July 22, 2015, the day after the New York Daily News published the video.

[7] The last ten pages of the medical records put into evidence (CCRB Ex. 2) concern treatment for an unrelated incident in 2014; I have ignored this portion of the medical records and do not consider them part of the record.

an opponent's head and neck area" and lists the head, neck, spine, and kidney, as areas to avoid hitting unless lethal force is necessary. (Ex. 3: 227-28, 231, 243.)

Procedural History & Legal Standards

No disciplinary charges were served against Respondents within the 18-month statute of limitations established by New York Civil Service Law Section 75(4) ("§75(4)"). Rather, charges were served on Respondents four (4) years later, in July 2019. In order to sustain charges against Respondents after the expiration of the 18-month statute of limitations, CCRB relied on the exception to the statute of limitations set forth in §75(4), reading, "such limitations shall not apply where the incompetency or misconduct complained of and described in the charges would, if proved in a court of appropriate jurisdiction, constitute a crime" (commonly referred to as the "Criminal Exception"). (*See Foran v. Murphy,* 342 N.Y.S.2d 4, at 7 [Sup. Ct., NY County 1973] ["The issue with respect to section 75 is not whether a crime has in fact been proved, but whether the acts alleged, '*if proved* in a court of appropriate jurisdiction,' would constitute a crime."]; *Disciplinary Case No. 68521/94* [April 23, 1997] ["The Department is under no obligation to prove the crime. The obligation is merely to allege conduct which would constitute a crime."].)

CCRB separately charged each category of force used in the instant disciplinary cases as an attempted assault in the third degree, citing New York Penal Law Section 120.00(1) (Assault in the Third Degree). The charges, as written, require proof of two elements: (1) "intent to cause physical injury to Thomas Jennings," and (2) "[attempting] to cause physical injury to Thomas Jennings." These elements mirror the elements of attempted assault in the third degree. Each element must be proved by a preponderance of the evidence.

a. *Intent to Cause Physical Injury*

Pursuant to Penal Law § 15.05(1), "A person acts intentionally with respect to a result or to conduct described by a statute defining an offense when his conscious objective is to cause such result or to engage in such conduct." An often-cited legal axiom by New York courts on the subject of intent is that "Every one must be presumed to intend the natural consequences of [their] acts" (*Darry v. People,* 10 NY 120, 151 [1854] [quoting *Regina v. Kirkham*, 8 Carrington & Payne 115 [1837] [Coleridge, J.]]; *People v. Thomas,* 50 NY2d 467, 475 [1980]). Since criminal assault prosecutions rarely involve express statements of intent (e.g. "I am hitting you because I want to cause you substantial pain"), courts often infer intent to cause physical injury from the use of force itself. (*See, e.g., People v. Williams (Richard),* 42 Misc 3d 149[A], 149 [2d Dept. 2014] ["Here, defendant's intent to cause physical injury can be inferred from his act of punching the complainant in the face and head."]; *Finn v. Leonardo,* 160 AD2d 1074, 1076 [3d Dept. 1990] ["We also note that the jabbing of an officer with a baton supports the finding of attempted assault even in the absence of actual injury."]; New York Criminal Practice § 57.02 (2020) ["[W]here the defendant punches the complainant in the jaw or strikes the complainant with a nightstick, the act is sufficient evidence of intent to cause physical injury."].)

Intent may also be inferred from Respondents' "conduct and the surrounding circumstances." (*People v. Bracey,* 41 NY2d 296, 301 [1977] ["[I]ntent can also 'be inferred from the defendant's conduct and the surrounding circumstances' [] and 'indeed this may be the only way of proving intent in the typical case' of criminal attempt."]; *People v. Jaber,* 172 AD3d 1227, 1229 [2d Dept 2019] ["'[I]ntent can be inferred from the act itself' [] or from the defendant's conduct and the surrounding circumstances."]; *cf. People v. Hatton,* 26 NY3d 364, 372 [2015], [In the context of a forcible touching case the New York Court of Appeals noted:

"[I]ntent is difficult to discern. Factors such as defendant's expressive conduct, the surrounding circumstances, the location of the incident and the existence of a prior relationship or a common understanding between the parties, may support or negate an inference that defendant harbored the statutory purpose."].) But "intent does not require advance planning. . . . [] intent can be formed, and need only exist, at the very moment the person engages in prohibited conduct or acts to cause the prohibited result, and not at any earlier time" (CJI2d[NY] Culpable Mental States – Intent [2020]).

b. *Attempt to Cause Physical Injury*

"Physical injury" is defined by the Penal Law to require "impairment of physical condition or substantial pain."[8] Substantial pain is "'more than slight or trivial pain' but 'need not ... be severe or intense'" (*People v. A.S.,* 28 Misc 3d 381, 384 [Crim. Ct., New York County 2010], quoting *People v. Chiddick,* 8 NY3d 445, 447 [2007]).

c. *NY Penal Law §35.30 Justification*

In the context of effecting an arrest of a person reasonably believed to have committed an offense, New York Penal Law Section 35.30 ("§35.30") permits uses of non-deadly force "when and to the extent [the officer] reasonably believes such [force] to be necessary to effect the arrest." The words "reasonably believes" encompass a standard of review that is both subjective ("i.e., what the actor believes") and objective ("i.e., whether a reasonable person could have had these beliefs" under similar circumstances). (*People v. Craig,* 78 NY2d 616, 622 [1991]; *Disciplinary Case No. 2018-19274* at 38 [August 19, 2019] ["While the reasonableness inquiry is rooted in the officer's individual belief, it is not a wholly subjective standard. The courts

[8] NY Penal Law § 10.00(9).

uniformly apply a standard that contains an objective component: the conduct of 'a reasonable person' under similar circumstances."].) The justification set forth in §35.30 is an ordinary defense, as opposed to an affirmative defense; therefore, defendants need only raise the defense, and, thereafter, without any obligation for the defendants to prove anything, the prosecution is required to prove that the justification does not apply. (*People v. Gray,* 150 Misc 2d 852, 854-855 [Crim Ct, New York County 1991]; *see also Disciplinary Case No.* 73352/98 [Feb. 25, 2000] ["[W]here his defense is that his action was justified, the Department must prove by a . . . preponderance of the credible evidence that he was not justified . . . Moreover, it is appropriate to apply the justification standard of the New York Penal Law, which is 'reasonable under the circumstances,' in an administrative forum."], *aff'd Meyer v. Safir,* 289 A.D.2d 6 [1st Dept 2001].)

Findings

As to the *actus reus* element of each charge ("did attempt to cause physical injury to Thomas Jennings"), this tribunal need not hypothesize as to the injury that could have occurred as a result of Respondents' attempted acts because Respondents admit that each act described in the charges was employed (Tr. 199-201, 209). Accordingly, we need only look to the record testimony and the medical records to assess any injuries and/or the level of pain caused.

As to each category of force employed, Mr. Jennings testified that he felt "pain." Mr. Jennings stated the pain was like "being [] put up against something [and] being hit numerous [] times" (Tr. 62). He also reported that after leaving the convenience store he felt "disoriented" and was "crying" (Tr. 76). The medical records establish that Mr. Jennings was treated for a 2cm laceration to his right eyebrow, requiring five stiches.

There can be little doubt that in isolation three forcible punches to a person's head, or nine asp strikes to a person's back, or one forcible elbow to person's head causing their head to slam into a glass display case, would cause the average person substantial pain. While I do not credit Mr. Jennings' testimony concerning his actions prior to entering the convenience store,[9] I do credit Mr. Jennings' testimony that he felt substantial pain. Furthermore, it is clear that the injury to Mr. Jennings' right eyebrow was received during the course of Respondents' use of force, even if the exact moment Jennings' received the injury could not be determined. Accordingly, I find that CCRB has proved by a preponderance of the evidence that Respondents caused physical injury to Thomas Jennings with each of their charged uses of force.

With regard to the *mens rea* element of each charge ("intent to cause physical injury to Thomas Jennings"), CCRB argued that while Respondents' ultimate objective was to "effect the arrest," Respondents' method of effecting the arrest was to injure Mr. Jennings in an unjustified and unnecessary manner (Tr. 291, 311). Respondents, in turn, argued that their only intent with "every single strike" was to get Mr. Jennings to comply with the arrest and be handcuffed (Tr. 257, 276).

As a preliminary matter, I reject Respondents' assertion that their *only* intent was compliance. The end goal of any attempted arrest is compliance, but it is a goal that is achievable in any number of ways. The particular method used to achieve compliance matters. One may intend to bring about compliance in a peaceful manner or in a violent manner, or in a manner that minimizes harm or with reckless disregard for any resulting harm.

[9] Indeed, even CCRB did not appear to credit Mr. Jennings' testimony that he did not run (Trial Tr. at 296, 299).

Here, the preponderance of the evidence establishes that the manner in which Respondents sought to achieve Mr. Jennings' compliance was by causing Mr. Jennings pain (i.e. pain compliance). Such tactics are not *per se* unlawful and in some circumstances may be reasonable and effective.[10] Accordingly, while I find that Respondents intended the substantial pain that was a natural consequence of the degree of force they employed, this tribunal must, nevertheless, consider whether Respondents' conduct is justified or authorized. Where conduct is justified or authorized it cannot constitute misconduct.

The standard applied by §35.30 is not unlike the reasonableness standard employed by this tribunal in administratively charged excessive force cases. Accordingly, §35.30 serves a dual purpose for an administrative tribunal where, as here, a use of force in the furtherance of an arrest is charged under the Criminal Exception and the charge mirrors the language of the criminal statute. As applied to this case (where the lawfulness of the arrest is not in issue), the analysis required by §35.30 is two-fold: (1) did Respondents subjectively believe the charged force was necessary to effect the arrest, and, if so, (2) is Respondents' proffered belief objectively reasonable.

Martinez – Specification 1 of 1 – Punching

Respondent Martinez testified that he employed the three punches because he believed that his partner was in danger.[11] Specifically, Respondent Martinez stated:

> I thought they were in a struggle. For us on patrol, we never pull out our baton. That's not -- unless it's something serious, like, a knife or a gun. Our batons never

[10] *See, e.g., Disciplinary Case No. 2016-16618* at 9 [Jan. 10, 2019] ["Based upon the record before me, the evidence supports a finding that an unannounced punch to [the suspect's] face, while clearly constituting a use of force, was an attempt to avoid employing a greater, and more likely than not lethal, use of force."].
[11] Penal Law Section 35.30 also authorizes uses of force "to defend a third person from what he or she reasonably believes to be the use or imminent use of physical force."

> come out. So, for me to hear Lutchman, plus see him with the baton in his hand, it raised every hair, every alert in my body that something serious was going on.

Respondent Martinez further stated that he punched Mr. Jennings three times in order to gain his compliance (Tr. 219).

Despite claiming that he was motivated to act because of concern for his partner's safety, Respondent Martinez made no attempts to communicate with his partner prior to resorting to force. He further admitted that upon entering the convenience store: he did not observe any struggle between Respondent Lutchman and Mr. Jennings; he did not observe Mr. Jennings reach for or display a knife; and he issued no commands to Mr. Jennings in the convenience store prior to resorting to force. Respondent Martinez also conceded that he knew backup would be on the scene soon.

Respondent Martinez's testimony as to his frisk of Mr. Jennings was also suspect and undermined his argument as to officer safety. Respondent Martinez claimed that he frisked Mr. Jennings and felt a "hard object" in Mr. Jennings left pocket, which Respondent Martinez believed may have been a knife; but he never informed his partner of this finding. Respondent Lutchman did not corroborate Respondent Martinez's testimony that there was a frisk of Mr. Jennings and he did not observe a bulge. Furthermore, in his arrest paperwork, Respondent Martinez made no mention of a frisk or a bulge. (Tr. 215-16, 242-44).

Respondent Martinez's credibility was called into question when he testified that upon entering the convenience store he did not see Mr. Jennings' hands up. He further claimed that he did not intend to strike Mr. Jennings in the head. And Respondent Martinez admitted that in the arrest paperwork that he prepared he noted "no force used," undermining his credibility and the reliability of his narrative concerning the incident. I further reject Respondent Martinez's

premise that if an asp is removed by an officer then there must be "something serious, like, a knife or a gun" involved, but I do accept that it would justify Respondent Martinez believing that his partner was facing a threat. Finally, at times, Respondent Martinez testified in an aggressive and combative manner, which would support an inference that Respondent Martinez may have been guided by his emotions more than objective factors when he used force upon Mr. Jennings. (Tr. 222-230, 238-239, 243-244.)

Given his lack of basic situational awareness in failing to observe the position of Mr. Jennings' hands (which were clearly up and visible) and questionable testimony at trial that, at times, strained credibility, I find that Respondent Martinez's proffered belief that rushing in and punching Mr. Jennings three times was then necessary to protect his partner to be objectively unreasonable under the circumstances. Accordingly, Respondent Martinez's intent to cause Mr. Jennings' substantial pain, which was a natural consequence of the force he employed, was not justified under the circumstances. I, therefore, find Respondent Martinez Guilty of the sole specification in Disciplinary Case No. 2018-19107.

Lutchman – Specification 1 of 2 – Asp

Respondent Lutchman credibly testified that he had reason to remove and engage his Department-issued expandable baton ("asp"). First, the call he responded to was a robbery involving a knife. Upon first engaging Mr. Jennings, Respondent Lutchman observed Mr. Jennings to be "agitated" and "fidgeting" (Tr. 156-57). Upon explaining to Mr. Jennings that he had been identified as a perpetrator of a robbery and that he was being arrested, Mr. Jennings then ran away from Respondents, leading Respondent Lutchman on a several block chase that left him feeling "exhausted" (Tr. 162). Upon entering the convenience store, Respondent Lutchman was in a close-quarters environment with a noncompliant suspect whom Respondent

Lutchman believed was armed with a knife. At this point, Respondent Lutchman removed and expanded his asp and his decision to do so was reasonable.

I further credit Respondent Lutchman's testimony that he told Mr. Jennings to put his hands behind his back. I do not credit Mr. Jennings' testimony that upon Respondent Lutchman entering the convenience store Respondent Lutchman was swinging his baton in a threatening manner and cursing at Mr. Jennings. To the contrary, as depicted on the video evidence, Respondent Lutchman kept his asp pointed downward and at his side, appeared to be speaking in a firm but calm manner, and reached for Mr. Jennings' hand to place him under arrest, which Mr. Jennings pulled away in noncompliance.

I further credit Respondent Lutchman's testimony concerning his use of the asp. Using the handle of the asp, Respondent Lutchman avoided strikes to areas of the body he was trained to avoid (the head, neck, and spine) and struck areas of the body that he was trained to strike, such as the torso. (Tr. 168-69, 175.)

Respondent Lutchman's testimony that he struck Mr. Jennings in the areas he felt were necessary in order to gain Mr. Jennings' compliance (Tr. 169) is further corroborated by the video evidence. As depicted on the video, after the first shoulder strike with his fist, Respondent Lutchman is seen using the asp in a methodical manner. He first strikes Mr. Jennings' lower left torso until Respondent Martinez is able to bring Mr. Jennings' left arm to the center of his back. Respondent Lutchman then moves without delay to Mr. Jennings' right shoulder blade to assist Respondent Martinez in gaining control of Mr. Jennings' right arm. Finally, Respondent Lutchman moves to Mr. Jennings' lower right torso as Respondent Martinez is attempting to handcuff Mr. Jennings' right arm. Furthermore, each strike involved Respondent Lutchman raising the asp a few inches off of Mr. Jennings' back, rather than using a full range of motion,

and Respondent Lutchman used the handle of his asp, rather than the weighted tip, to strike Mr. Jennings.

Taking into account all of the above factors, the level of force employed by Respondent Lutchman's use of his asp was not unreasonable under the circumstances and it was objectively reasonable for Respondent Lutchman to believe that the manner in which he used the asp was necessary to effect Mr. Jennings' arrest. Accordingly, while Respondent Lutchman's strikes were intended to cause pain, they were justified. I, therefore, find Respondent Lutchman Not Guilty of Specification 1 in Disciplinary Case No. 2018-19106.

Lutchman – Specification 2 of 2 – Elbow

Respondent Lutchman testified that he struck Mr. Jennings in the head with his elbow[12] because Mr. Jennings "kept moving" and he feared that Mr. Jennings could "fight us . . . run away again, or God forbid, he pulls out a knife and stabs us" (Tr. 171-72, 200). As depicted in the video evidence, the strike delivered by Respondent Lutchman is forceful and drove the right side of Mr. Jennings' face into the top of the ice cream freezer. Prior to deploying the strike, Respondent Lutchman can be seen looking at another backup officer who arrived on scene (Ex. 1 at 0:43). Furthermore, at the time of the elbow strike, Mr. Jennings' hands were already behind his back, which Respondent Lutchman appears to have observed (Ex. 1 at 0:44).

CCRB described the elbow strike as "vicious" and "potential[ly] lethal" (Tr. 310-11). I do not find either description to be accurate. No testimony was elicited and no evidence was submitted that Respondent Lutchman exhibited any special animus directed towards Mr.

[12] During one portion of Respondent Lutchman's testimony on cross-examination, he claimed that it was his forearm rather than his elbow that made contact with Mr. Jennings head during this strike (Tr. 199). This is the only time at trial that Respondent Lutchman's forearm was mentioned. Throughout the trial both parties referred to the strike as involving the elbow. Nevertheless, the video evidence depicts both Respondent Lutchman's elbow and forearm making contact with Mr. Jennings' head during the strike; accordingly, here it is a distinction without a difference.

Jennings. Furthermore, while the strike was forceful, it was not deployed in a manner to employ deadly force.

Nevertheless, Respondent Lutchman's stated belief that he thought the strike necessary to keep Mr. Jennings from moving is not objectively reasonable when he knew backup to be on the scene and Mr. Jennings' hands were already behind his back. Furthermore, the force of the strike is such that it would cause the average person substantial pain. While no evidence was presented at trial that the laceration to Mr. Jennings' eyebrow was caused by this strike, it is an injury that is not inconsistent with a strike of this nature. For the above reasons, I find that Respondent Lutchman's intent to cause Mr. Jennings substantial pain, which was a natural consequence of the force he employed, was not justified or authorized under the circumstances. I, therefore, find Respondent Lutchman Guilty of Specification 2 in Disciplinary Case No. 2018-19106.

PENALTY

In order to determine appropriate penalties for Respondents, their service records were examined (*see Matter of Pell v. Board of Educ.,* 34 N.Y.2d 222, 240 [1974]). Both Respondent Martinez and Respondent Lutchman were appointed to the Department on July 9, 2013. Information from their personnel records that was considered in making these penalty recommendations are contained in attached confidential memoranda. Both Respondents have no disciplinary histories.

The penalties recommended by CCRB in this matter are 15 vacation days for Respondent Martinez and 20 vacation days for Respondent Lutchman (Tr. 313). In support of its penalty recommendations, CCRB cited three excessive force cases.

The first case cited by CCRB is *Disciplinary Case No. 2015-14484* (Aug. 3, 2017), wherein a four-year police officer with no disciplinary record forfeited seven (7) vacation days

for striking an individual in the face with a closed fist before handcuffing him. The subject officer and her partner had seen the man acting suspiciously although there was insufficient evidence that he had behaved in a threatening manner. The "one brief punch" was delivered to the suspect's face ("lower left cheek"). No injuries were reported.

The second case cited by CCRB is *Disciplinary Case No. 2016-15603* (Oct. 6, 2017), wherein a four-year police officer with no disciplinary record forfeited 15 vacation days for punching an arrestee about the face after the arrestee slapped the respondent's hand away during the arrest. The punch caused the arrestee's head to hit a wall, causing the arrestee to lose consciousness. The arrestee claimed that prior to the punch he had his hands up, palms open. The arrestee's injuries included a contusion to the head (above the left eye), a chipped tooth and abrasions. The subject officer was also treated for a "likely contusion" to his right hand. In supporting the 15 vacation day penalty, the hearing officer cited three cases, all involving the forfeiture of 15 vacation days for punching a handcuffed arrestee.

Finally, the third case cited by CCRB is *Disciplinary Case No. 2013-10851* (Feb. 27, 2015), wherein an eight-year police officer with no disciplinary record forfeited ten (10) vacation days for striking a complainant in the head with an asp. Because Respondent Lutchman has been found Not Guilty in connection with his use of the asp, I do not find this case to be applicable.

In connection with the sole specification in Disciplinary Case No. 2018-19107, wherein Respondent Martinez has been found Guilty of striking Mr. Jennings in the head with a closed fist, I find the level of force used by Respondent Martinez to be more severe than that used by the subject officer in *Disciplinary Case No. 2015-14484,* involving "one brief punch" with no injuries, and less severe than that used by the subject officer in *Disciplinary Case No. 2016-15603,* which included a face punch that caused the suspect's head to hit a wall with such

force that he lost consciousness and injured both the arrestee and the officer. Furthermore, unlike the cases cited in support of *Disciplinary Case No. 2016-15603,* the instant case does not involve using excessive force on a handcuffed person.

Rather, for precedential purposes, I find *Disciplinary Case No. 2015-13090* (Oct. 25, 2016) to be persuasive. In that case, a seven-year officer with no disciplinary history forfeited 10 vacation days for punching an individual in the head. Video evidence showed that at the time of the punch, the individual had ceased resisting arrest and was standing with his hands at his sides. The use of force occurred after the officers attempted to stop the suspect for rolling what they believed was a marijuana cigarette. When the officers approached the suspect, he ran, causing the officers to undertake a substantial chase. After the suspect had stopped running, the subject officer exited a Department van, ran over to where his partner was standing with the suspect and punched the suspect in the head (the ADCT described the subject officer's actions as "barrels up and punches him"). The officer claimed that he punched the suspect to protect his partner. As a result of the punch, the suspect fell to the ground, sustaining a laceration to the back of his head. As with the subject officer in *Disciplinary Case No. 2015-13090,* Respondent has no disciplinary history. Accordingly, I recommend a penalty of the loss of 10 vacation days for Respondent Martinez.

In connection with Specification 2 in Disciplinary Case No. 2018-19106, wherein Respondent Lutchman has been found Guilty of striking Mr. Jennings in the head with his elbow, I find the precedent cited above to support a penalty recommendation of the forfeiture of 12 vacation days. While Mr. Jennings was not in custody at the time of the strike, there is somewhat of a functional equivalency in that both of his hands were behind his back and backup officers were already on the scene. Furthermore, the strike occurred after Respondent Martinez

had already delivered three punches and after Respondent Lutchman had struck Mr. Jennings nine times with the handle of his asp. Finally, the injury to Mr. Jennings' right eyebrow, while not proven to be a result of the elbow strike, is certainly not inconsistent with such a strike and the strike did cause the right side of Mr. Jennings' face to slam against a glass display case. Given the timing and forceful nature of Respondent Lutchman's final strike, though it may not be different in kind from Respondent Martinez's use of force, it is different in degree. Accordingly, I find that an additional two vacation days is sufficient to account for the difference. I, therefore, recommend a penalty of the loss of 12 vacation days for Respondent Lutchman.

Respectfully submitted,

Josh Kleiman
Assistant Deputy Commissioner Trials

APPROVED
FEB 22 2021
DERMOT SHEA
POLICE COMMISSIONER

POLICE DEPARTMENT CITY OF NEW YORK

From: Assistant Deputy Commissioner – Trials

To: Police Commissioner

Subject: CONFIDENTIAL MEMORANDUM
POLICE OFFICER LENNY LUTCHMAN
TAX REGISTRY NO. 955104
DISCIPLINARY CASE NO. 2018-19106

Respondent was appointed to the Department on July 9, 2013. On his last three performance evaluations, Respondent received a 4.0 overall rating of "Highly Competent" in 2016 and twice received 3.5 overall ratings of "Highly Competent/Competent" in 2014 and 2015. He has been awarded four medals for Excellent Police Duty. [redacted]

Respondent has no disciplinary record.

For your consideration.

Josh Kleiman
Assistant Deputy Commissioner Trials

POLICE DEPARTMENT CITY OF NEW YORK

From: Assistant Deputy Commissioner – Trials

To: Police Commissioner

Subject: CONFIDENTIAL MEMORANDUM
SERGEANT PEARCE MARTINEZ
TAX REGISTRY NO. 955137
DISCIPLINARY CASE NO. 2018-19107

Respondent was appointed to the Department on July 9, 2013. On his most recent performance evaluations, Respondent received a 4.5 annual overall rating of "Extremely Competent/Highly Competent" for 2019; two 4.0 ratings of "Highly Competent" on probationary evaluations spanning August 2018-June 2019; and a 3.5 annual rating of "Highly Competent /Competent" for 2016. He has been awarded three medals for Excellent Police Duty. [redacted].

Respondent has no disciplinary record.

For your consideration.

Josh Kleiman
Assistant Deputy Commissioner Trials